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Supreme Court of the United States

OCTOBER TERM, 1995

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. AND COLORADO PROFESSIONAL EDUCATION, INC. D/B/A COLORADO BAR REFRESHER, INC.,

Petitioners,

vs.

MULTISTATE LEGAL STUDIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for antitrust tying or predatory pricing purposes, the sale for a single price of a consumer-demanded composite product that includes an admittedly essential component, also sold separately, constitutes the sale of two products.

2. Whether a court may disregard attempted product improvement as a business justification for an alleged tying arrangement by invoking the *per se* rule against tying or by leaving that determination to a jury instead of the marketplace.

3. Whether a firm selling two products as a package can be found liable for predatory pricing where the package price exceeds the sum of the costs of both products.

4. When there has been no prior history of cooperation with business rivals, whether a monopolist has a duty to cooperate in order to avoid adversely affecting the demand for a rival's product or raising its costs.

LIST OF PARTIES AND RULE 29.6 LIST

The caption of this petition identifies all parties in the lower court. Petitioner Colorado Professional Education, Inc. d/b/a Colorado Bar Refresher, Inc. ("CBR") has no parent corporation and no subsidiaries. The parent corporation of Petitioner Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJ Legal") is Harcourt General, Inc. Petitioner HBJ Legal has no subsidiaries.

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Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJ Legal") and Colorado Professional Education, Inc. ("CBR") respectfully request that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Tenth Circuit entered on August 29, 1995. The Tenth Circuit reversed the order of the United States District Court for the District of Colorado granting summary judgment in favor of petitioners.

OPINIONS BELOW

The opinion of the court of appeals is reported at 63 F.3d 1540 (10th Cir. 1995). It is reprinted in the appendix ("App.") at 1a-43a. The district court's oral ruling granting petitioners' motion for summary judgment is reprinted at App. 44a-55a. The court of appeals' order denying petitioners' petition for rehearing is not reported and is reprinted at 56a-57a.

JURISDICTION

The court of appeals entered judgment on August 29, 1995. It denied a timely petition for rehearing on October 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 (1994), and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The pertinent portions of these provisions are set forth at App. 58a-59a.

STATEMENT OF THE CASE

Petitioners HBJ Legal and CBR (referred to hereinafter by their trade name "BAR/BRI") offer a six-week "full-service" bar review course in Colorado that is intended to prepare students for all aspects of the bar exam.[1] Since 1972, Colorado has included the Multistate Bar Examination ("MBE") as part of its bar examination and students who achieve an MBE score of 152 or higher automatically pass the Colorado exam.[2] Soon after the MBE was included as part of the Colorado bar exam, BAR/BRI and its full-service competitors added MBE training as an integral part of their full-service bar review courses. (Conviser Aff. ¶¶ 8-11,

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1 HBJ Legal, directly or through licensees such as CBR, offers full-service courses in most states at the end of the fall and spring semesters in preparation for the winter and summer bar examinations.

2 Like most jurisdictions, Colorado's bar examination consists of the MBE, the Multistate Professional Responsibility Examination ("MPRE"), a performance exam and an essay examination on state or general law. The MBE is a 200 question multiple-choice examination covering six basic areas of law -- contracts, constitutional law, criminal law, evidence, property and torts.

19-25)[3] Over the years the level of MBE training in full-service courses has continued to grow and expand, but has always included simulated MBE exams, lectures on test-taking techniques and analysis of practice questions.[4] (Davis Aff. ¶ 11; Conviser Aff. ¶¶ 9, 10)

In 1977, perceiving a deficiency in MBE training within full-service courses, respondent (referred to hereinafter by its trade name "PMBR") began to offer a three-day supplemental MBE workshop consisting of a practice examination and two days of analysis. PMBR scheduled its course just prior to the bar examination and at or near the end of the BAR/BRI or other full-service courses. While full-service courses emphasized that the MBE training they included was all that a student needed to pass the bar exam, PMBR, which originally offered only MBE supplements, largely had the MBE supplement market to itself and soon achieved monopoly market power in that market on a nationwide basis. In 1991, the last year before the conduct in question in this litigation, PMBR's market share exceeded 84 percent of the Colorado supplemental MBE market. (Baseman Aff. Ex. 3)

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[3] Citations to affidavits and transcripts preceded by a person's last name are to affidavits and portions of deposition transcripts submitted by the parties on defendants' motion for summary judgment and made a part of the appendix in the court below.

[4] Full-service courses often refer to the portion of their course in which they administer and review MBE practice questions as a "workshop." (Davis Aff. ¶ 5; Conviser Aff. ¶ 10)

In 1983, BAR/BRI decided to attempt to compete with PMBR by offering, in addition to its full-service course, a three-day supplemental MBE workshop, most recently called "Gilbert," that it promoted to students who did not take the BAR/BRI full-service course or who felt they needed additional MBE training. At the same time, however, BAR/BRI, like other full-service course providers, continued to improve the MBE component of its full-service course. In 1983, BAR/BRI added an MBE technique lecture, and in 1985 it increased the number of practice questions to 650 and added a six-hour MBE workshop. (Davis Aff. ¶¶ 21, 22) Similarly, by 1987, BAR/BRI's full-service competitor in Colorado, Kaplan-SMH ("SMH"), had expanded its full-service course to include a comprehensive volume of MBE practice questions, 18 hours of MBE workshops, two practice exams and a diagnostic analysis. (Davis Aff. ¶ 26 Ex. 5) At all times, BAR/BRI promoted its full-service course as containing sufficient MBE preparation so that its students did not need an MBE supplemental course.

BAR/BRI's decision to market both a full-service course and a supplemental MBE course rendered it vulnerable to a highly effective negative advertising campaign instituted by PMBR in the mid-1980s. Referring to Gilbert, PMBR claimed in its advertisements that BAR/BRI was overcharging its students by making them pay extra for MBE training, in effect admitting that its full-service course did not provide adequate MBE preparation. (Conviser Aff. ¶¶ 32, 37 & Exs. 8, 14) SMH, the other Colorado full-service course, which by this time was including all its MBE training in its full-service curriculum, also began to attack BAR/BRI for charging students "extra" for what it claimed was

included in SMH's full-service course for "free." (Conviser Aff. ¶¶ 33, 35 and Exs. 3, 9-11)

Commencing in 1990, BAR/BRI reacted to these negative advertisements by adding nine hours of in-class MBE testing drills to its full-service course and replacing the existing simulated MBE with an improved computer-graded practice MBE examination. (*See* Davis Aff. ¶¶ 18, 22) The new in-class MBE testing drills, along with the improved MBE examination and the MBE introductory lecture, were then advertised as the "HarBrace" workshops. (Davis Aff. ¶ 22) In the January 1992 course, BAR/BRI made further improvements in its MBE training resulting in the addition of an extra day to the "HarBrace" portion of the BAR/BRI course. BAR/BRI continued, however, to offer Gilbert separately. PMBR's and SMH's advertisements attacking BAR/BRI for selling Gilbert separately also continued.

As each of these improvements was made to the MBE training in BAR/BRI's full-service course, enrollment in Gilbert steadily declined from over 300 students in 1986 to only one enrolled student for the winter 1992 Gilbert course. (Davis Aff. ¶ 27) In the summer of 1992, BAR/BRI combined all its MBE training into its full-service course for which it charged a single tuition. In this process, another day of MBE training was added to the Colorado BAR/BRI full-service course and the teaching materials were revised. (Davis Aff. ¶ 29) Thus, by the summer of 1992, BAR/BRI provided its full-service students with a three-day block of MBE training, which it chose to call Gilbert, and

advertised as "free" to BAR/BRI students.[5] Those students not enrolled in the full-service course could still purchase just the three-day Gilbert portion of the course separately. As a result, BAR/BRI's full-service course, just like SMH's full-service course in Colorado and PMBR's full-service courses in California and Georgia, now included all its MBE training with no additional charge. Today, virtually all full-service courses around the country include MBE workshops without additional charge. (Conviser Aff. ¶¶ 54-56)

PMBR claimed that, beginning in 1991, BAR/BRI created deliberate conflicts between the schedule of its course and PMBR's course. PMBR claimed that it attempted to avoid scheduling its supplemental MBE course on the same days that BAR/BRI classes were taught, even though PMBR sessions are offered during the day until 4:00 p.m. while BAR/BRI classes are taught at night beginning at 6:00 p.m.[6] BAR/BRI never attempted to coordinate course schedules with PMBR.

PMBR sued under Section 1 of the Sherman Act, alleging that BAR/BRI unlawfully tied Gilbert to its full-

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[5] In 1992, tuition for BAR/BRI students in Colorado was $795 for the six-week course, the same as the previous year. In 1993, tuition was raised $50 to account for cost increases in all components of the course. It is undisputed that, in both 1992 and 1993, the full-service tuition more than covered all the costs of the course under any measure. During the same period, PMBR's tuition for its three-day MBE supplemental course was $350.

[6] BAR/BRI also provides its students audiotapes and video replays of lectures missed at no additional charge.

service course and engaged in predatory pricing by offering Gilbert free to BAR/BRI students. In addition, PMBR accused BAR/BRI of violating Section 2 based on the aforementioned conduct and also on the claim that, beginning in 1991, BAR/BRI intentionally created schedule conflicts between its course and the PMBR course. PMBR sought treble damages and a permanent injunction barring BAR/BRI from including Gilbert in its full-service course and requiring BAR/BRI to publish a course schedule far enough in advance so that PMBR could schedule its course however it chose.

After completion of pretrial discovery, BAR/BRI sought summary judgment, conceding solely for purposes of the motion that it had monopoly power in the full-service market in Colorado and that supplemental MBE courses were sold in a separate product market. The parties also stipulated that a full-service course is a single product that includes preparation for all aspects of the bar examination including the MBE examination.[7]

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[7] The full text of the pertinent stipulations is as follows: "[a] full-service bar review course is designed to prepare students for all components of that jurisdiction's bar examination"; "CBR offers a full-service bar review course in the State of Colorado consisting of a six-week curriculum that prepares students for the Colorado bar examination, including the essay portion of the exam, the MBE, the PT and the MPRE." (Pretrial Order ¶¶ IV.C.1., IV.F.2.)

THE PROCEEDINGS BELOW

The District Court's Decision

After considering all evidence and drawing all factual inferences in PMBR's favor, the district judge granted summary judgment in favor of BAR/BRI. (App. 45a-52a) Referring to the parties' pre-trial stipulation that full-service courses include preparation for all components of the bar examination including the MBE, the district court held that the BAR/BRI course was a single product and that BAR/BRI's conduct was simply a legitimate attempt to make improvements in the MBE portion of its course, conduct the antitrust laws are intended to promote. With regard to alleged schedule conflicts, the court found, in light of law students' well-known round-the-clock preparation leading up to the bar examination and the fact that BAR/BRI classes begin two hours after PMBR sessions end, that there were no schedule conflicts of antitrust significance even if the courses were scheduled on the same day.

The Tenth Circuit's Decision

The Tenth Circuit reversed.[8] First, despite the stipulation, the court held that inclusion of Gilbert in BAR/BRI's full-service course resulted in the full-service course becoming two separate products so that any increase

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[8] The court of appeals affirmed the grant of summary judgment on PMBR's Section 2 claims related to alleged false advertising and alleged monopolization of the full-service market. These claims are not the subject of this petition.

in tuition attributable to Gilbert would constitute an unlawful tie-in if a jury concluded that separate consumer demand existed for supplemental MBE courses. The court found that, by raising the 1993 BAR/BRI tuition by $50, BAR/BRI engaged in unlawful tying. The court refused to consider BAR/BRI's business justification defense of attempted product improvement under Section 1 because it applied the *per se* standard to review the tying allegations. The court also determined that the inclusion of Gilbert in 1992 at no additional charge could be predatory pricing even though it is undisputed that the 1992 tuition of $795 easily covered all fully allocated costs for the entire BAR/BRI course including Gilbert. It also denied summary judgment as to the Section 2 claims because it found a jury might conclude that the addition of more MBE training did not actually improve the BAR/BRI course. Finally, the court held that a jury could find BAR/BRI's failure to coordinate its schedule with PMBR was a violation of Section 2 because it could raise PMBR's costs or inconvenience PMBR's students.

REASONS FOR GRANTING THE WRIT

Issues of overriding importance to the antitrust law of tying, product improvements, pricing, and cooperation by firms with monopoly power were erroneously decided below, creating a split among the circuit courts and an intolerable deviation from the Court's earlier decisions. If allowed to stand, the Tenth Circuit's rulings will deter competition and place in doubt competitive practices routinely undertaken by firms selling composite products or services, whenever any of these essential components are also sold separately. At-

tempts by competitors to improve their products and respond to competition will be undercut and new duties to cooperate among rivals will be created in the name of antitrust jurisprudence. Armed with this ruling, threatened treble damages and injunctions, antitrust plaintiffs will enlist the aid of juries, instead of the judgments of consumers in the marketplace, to assess the innovations of their rivals.[9]

I.

THE TENTH CIRCUIT RULING MISCONSTRUED THE *JEFFERSON PARISH* TWO-PRODUCT TEST AND CONFLICTS WITH A MAJORITY OF THE CIRCUITS

In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), the Court determined that whether one product or two are involved for purposes of an antitrust tie-in

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[9] Supreme Court review at the summary judgment stage of this litigation is desirable since pre-trial discovery is complete and, if BAR/BRI's view as to the law is correct, a lengthy trial and further appellate review would be a waste of judicial energy and the resources of the parties. "Summary judgment is particularly important in antitrust cases because of the fearful dimensions that such cases can assume and because of the powerful incentives to offer claims or defenses of little merit." 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 322, at 62 (rev. ed. 1995). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660 n.4 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987).

analysis depends "not on the functional relation between them, but rather on the character of the demand for the two items." 466 U.S. at 19; *see also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462-63 (1992). In announcing this rule, the Court ruled out one extreme view of the two-product inquiry -- that two products can be treated as one for antitrust purposes whenever they are functionally related. However, neither *Jefferson Parish* nor *Kodak* addressed the issue here: Whether a composite product that *necessarily* includes a component also sold separately should be treated as two products.[10] By its extension of *Jefferson Parish* and *Kodak* to composite products, the Tenth Circuit carries the two-product inquiry to the opposite extreme: All products that include one or more elements for which separate demand exists are now to be treated as tie-ins, even when the composite product, by definition, must include the component.

The parties stipulated that full-service bar review courses that include MBE preparation are a single product for which separate demand exists. By treating BAR/BRI's

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10 In both cases, the Court was careful to point out that the alleged tied product was not an *essential* component of the tying product. *Jefferson Parish*, 466 U.S. at 23 n.36 ("only 27 percent of anesthesiologists have financial relationships with hospitals"); *id.* at 23 ("consumers differentiate between anesthesiological services and the other hospital services provided by petitioners"); *id.* at 24 n.39 ("other hospitals often permit anesthesiological services to be purchased separately"); *Kodak*, 504 U.S. at 462 ("Evidence in the record indicates that services and parts have been sold separately in the past and still are sold separately to self-service equipment owners.")

1992 enhancements to the MBE component of its course as a tie-in of two products despite the parties' stipulation, the Tenth Circuit has distorted the two-product requirement of *Jefferson Parish* and *Kodak* into an instrument for the obstruction of pro-competitive behavior and placed itself at odds with a number of other circuits.

Subsequent to *Jefferson Parish,* the Seventh Circuit in *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984), emphasized that "a building is a single product and not a tie-in of the walls, floors, roof, windows, and so forth," 737 F.2d at 704, even if some of these components are also available in separate markets. As Judge Posner explained:

> Almost every product can be viewed as a package of component products: a pair of shoes, for example, as a package consisting of a left shoe and a right shoe; a man's three-piece suit as a package consisting of a jacket, vest, and pants; a belt as a package consisting of a buckle and a strap. . . . Very few products today are produced like a statue that is made by pouring molten bronze into a cast -- the ultimate single product. *But to hold therefore that every composite product is a tie-in, subject to the hostile scrutiny to which antitrust law still subjects tie-ins, would place industry under a vast antitrust cloud, and has been rejected.*

Id. at 703 (emphasis added).

All other circuits that have considered the issue agree. In an unpublished opinion, the Fourth Circuit ruled,

in *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir.) (per curiam), *cert. denied*, 114 S. Ct. 440 (1993), that the sale of descriptions of real estate in a multi-list service together with photographs of the real estate constituted a single product, even though formerly photographs were only sold separately.[11] Similarly, the Ninth Circuit upheld the ruling that residences sold with leaseholds of real estate constitute a single product even though there may be "a market for houses apart from the land, just as there may be a market for automobile engines apart from the whole motor car." *Souza v. Estate of Bishop*, 594 F. Supp. 1480, 1487 (D. Haw. 1984), *aff'd*, 821 F.2d 1332 (9th Cir. 1987); *see also Sobrato v. Prudential Ins. Co. of Am.*, 632 F.2d 786, 787 (9th Cir. 1980) (land sold with improvements combined to form a single product).

The Tenth Circuit's ruling is directly contrary to these decisions. As stipulated, full-service bar review courses satisfy consumer demand to take a single course covering all aspects of the bar examination, and thus squarely fit within the Seventh Circuit's definition of "composite products" in *Jack Walters*. MBE preparation is as essential to a full-service course as is the buckle on a belt. The Tenth

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[11] The Tenth Circuit cited *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), for the proposition that computer support services and a diagnostic software program were not a single product even though functionally related. (*See* App. 14a) However, there, as in *Jefferson Parish* and *Kodak*, ample evidence existed that the purchase of support services was not *essential* to the sale of the diagnostic software program.

Circuit placed itself squarely at odds with the *Jack Walters* line of cases in holding that two products were involved since separate demand existed for MBE supplemental courses. *Compare Jack Walters*, 737 F.2d at 704 ("[w]e doubt that, even after *Jefferson Parish*, belts are tie-ins of buckles to straps" even if there is separate demand for ornamental buckles). The Tenth Circuit either failed to understand or simply brushed aside the dramatic expansion of *Jefferson Parish* and *Kodak* its decision entails by treating a composite product as a tie of two separate products, notwithstanding the stipulation that full-service courses must include MBE preparation. Its only citations supporting this expansion were three decisions that did *not* concern composite products at all; instead, all three cases involved the tying of replacement parts to electric motors or automobiles.[12] Unlike a full-service bar review course, which cannot be sold without MBE training, there is ample demand for automobiles or electric motors separate from replacement parts.

If allowed to stand, the Tenth Circuit's ruling will dramatically expand the reach of the antitrust laws and place in doubt a number of very important competitive practices routinely undertaken by firms, both large and small. There

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[12] (*See* App. 14a-15a (citing *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 720 (7th Cir. 1987) (electric motors and replacement parts); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506, 1515 (N.D. Cal. 1984) (Mercedes-Benz automobiles and replacement parts); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 1982-2 Trade Cas. (CCH) ¶ 64,861 (D. Md. 1982) (same), *rev'd in part*, 1984-1 Trade Cas. (CCH) ¶ 65,766 (D. Md. 1983), *vacated and earlier order reinstated*, 1984-2 Trade Cas. (CCH) ¶ 66,226 (D. Md. 1984)))

are countless products in today's society that consist of components for which there is separate consumer demand. Consider, for example, automobiles with tires, radios or air conditioners; houses with land, windows or doors; cold pills consisting of decongestants plus pain relievers; cookies made with butter; shoes with laces; or belts with buckles, to name just a few.

The decision at bar creates a serious conflict among the circuits as to an issue left open by this Court in *Jefferson Parish* and *Kodak*. This Court's attention is required to resolve this conflict and to undo the threat to competition posed by the Tenth Circuit's flawed analysis.[13]

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[13] The Tenth Circuit also erred in finding that economic coercion might occur in this case since purchasers of BAR/BRI's full-service course received additional MBE training without additional charge. (*See* App. 17a-18a) Whether BAR/BRI's tuition remained at $795 (as it did in 1992) or was increased by $50 (as it was in 1993), there is no dispute that BAR/BRI's tuition is the same whether or not the student attends the Gilbert portion of the course or purchases additional MBE training elsewhere. Courts and commentators agree that for there to be a finding of economic coercion the cost of the tying product alone must exceed the cost of the tying and the tied products sold as a package. *See, e.g., In re Data Gen. Corp. Antitrust Litig.*, 490 F. Supp. 1089, 1111 (N.D. Cal. 1980) (more expensive to purchase CPU without memory than to buy CPU bundled with memory); Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 8.10, at 238 (1985) (economic coercion exists where product A is $10 purchased alone but $6 when purchased with product B).

II.

THE TENTH CIRCUIT'S REJECTION OF BAR/BRI'S PRODUCT IMPROVEMENT DEFENSE GENERATES CONFUSION IN THE COURTS AND ANTI-COMPETITIVE CONSEQUENCES IN THE MARKETPLACE

Even if viewed as the tying of two separate products, the incorporation into BAR/BRI's full-service course of MBE materials developed for use in the supplemental market was nothing more than an obvious attempt to improve BAR/BRI's course in response to competition. However, the Tenth Circuit refused to consider the legitimate business justification of product improvement as a defense under the *per se* Section 1 tying standard. It then proceeded to reverse the summary judgment granted under Section 2 by holding that a jury might conclude that the BAR/BRI course was not, in fact, improved. Both determinations require the Court's review.

A. APPLICATION OF THE *PER SE* STANDARD IN TIE-IN CASES TO FORECLOSE ANY BUSINESS JUSTIFICATION DEFENSE INTENSIFIES CIRCUIT CONFLICTS AND PREVENTS FIRMS FROM ENGAGING IN PRO-COMPETITIVE BEHAVIOR

The Tenth Circuit's decision demonstrates the need for the Court to reconsider the *per se* standard in tying actions. Even if a *per se* standard is retained, a conflict exists among the circuits as to whether the standard permits

business justifications to be considered under Section 1 of the Sherman Act.[14]

In *Jefferson Parish*, a bare 5-4 majority concluded that:

> It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "*per se*."

466 U.S. at 9.

Few antitrust rulings of this Court have generated more critical commentary and decisional confusion in the lower courts.[15] In light of this trenchant criticism and the

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[14] Reconsideration of the *per se* rule against tying is appropriate in this case because, under the Tenth Circuit's holding, a jury could find that BAR/BRI's inclusion of Gilbert in the Summer of 1992 enhanced consumer welfare but still be forced to conclude that the inclusion of Gilbert was *per se* unlawful under Section 1. As the Tenth Circuit saw it, the jury should be permitted to consider BAR/BRI's proffered business justifications and the net effect on competition in the tied product market only under Section 2, and yet be foreclosed from applying the same rule of reason analysis in a Section 1 inquiry.

[15] *See, e.g.*, 9 Phillip E. Areeda, *Antitrust Law* ¶ 1720a, at 258 (1991) ("the *per se* rule against tying provides little guidance and simplifies little"); *id.* ¶ 1730, at 406 (*per se* tying rule "is ripe for reform because the prerequisites for *per se* illegality are absent and because this peculiar *per se* rule does not benefit society with simplified litigation or private planning"); Kurt A. Strasser, *An* (continued...)

confusion the rule has generated, the *per se* rule ought to be reconsidered. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-58 (1977) (jettisoning *per se* rule in vertical territorial restriction cases since the rule was "the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts"). Thus, it is now appropriate for the Court to adopt Justice O'Connor's carefully reasoned view, set forth in her concurring opinion in *Jefferson Parish*, that:

> The time has therefore come to abandon the "*per se*" label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. . . . This change

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[15](...continued)

Antitrust Policy for Tying Arrangements, 34 Emory L.J. 253, 288 (1985) (*per se* rule articulated in *Jefferson Parish* "is too rigid and simplistic" because "it does not consider motives other than an intent to monopolize the tied market, and it overlooks potential justifications for the tie"); *see also* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 380-81 (1978); Richard A. Posner, *Antitrust Law: An Economic Perspective* 171-83 (1976); William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Cal. L. Rev. 933, 939-40 (1987); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 143-46 (1984); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 20, 29-34 (1957); Lawrence T. Festa, III, Comment, *Eastman Kodak Co. v. Image Technical Services, Inc.: The Decline and Fall of the Chicago Empire?*, 68 Notre Dame L. Rev. 619, 644, 671 (1993) .

> will rationalize rather than abandon tie-in doctrine as it is already applied.

466 U.S. at 35 (O'Connor, J., concurring).

Despite the *per se* appellation, other than the Tenth Circuit, the circuits that have considered the issue have concluded that they can examine legitimate business justifications for a tie proffered by a defendant. The Fourth, Sixth and Ninth Circuits have all held that antitrust defendants may demonstrate a business justification for an otherwise *per se* illegal tying arrangement. *See Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft,* 828 F.2d 1033, 1042 n.17 (4th Cir. 1987) ("Business justification, of course, is an affirmative defense to claims of *per se* illegality."), *cert. denied*, 486 U.S. 1017 (1988); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir.) ("Even if a per se violation is established, a defendant may prevail by showing a substantial business justification for the tie-in."), *vacated on other grounds,* 113 S. Ct. 314 (1992); *Mozart Co. v. Mercedes-Benz of N. Amer., Inc.*, 833 F.2d 1342, 1348-49 (9th Cir. 1987) (citing four other Ninth Circuit decisions on point), *cert. denied*, 488 U.S. 870 (1988).

In *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (Breyer, J.), the First Circuit suggested in dictum that, given sufficient evidence of legitimate, procompetitive business justifications and that the tie was "'efficient' enough a way to do business," a tying agreement could "escape[ ] . . . *per se* condemnation under the lines of cases that have created certain exceptions to the *per se* rule where economic, or procompetitive justifications

are particularly strong." *Id.* at 799; *see also Kenworth of Boston, Inc. v. Paccar Fin. Corp.*, 735 F.2d 622, 624 (1st Cir. 1984) (Breyer, J.) (expressing concern that tie-ins not be treated like "a procrustean bed").

The underlying rationale against tying -- that a monopolist in market A will be able to use its power in market A to gain an unfair advantage in market B -- is also at odds with the Court's most recently pronounced views on monopolization law. In *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993), the Court confirmed that conduct by a single firm is actionable under Section 2 only when it threatens to result in actual monopolization of another market. *Id.* at 892.[16] This coincides with Justice O'Connor's position, in her concurrence in *Jefferson Parish*, that tying arrangements should be unlawful only where there is a dangerous probability that the defendant could obtain market power in the market for the tied product. *See* 466 U.S. at 38-39 (O'Connor, J., concurring). This approach is also consistent with accepted antitrust analysis of monopoly leveraging.[17]

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[16] In fact, as the record makes clear, PMBR and not BAR/BRI dominates the sale of MBE supplements. (Baseman Aff. Ex. 3)

[17] In related contexts, circuit courts have rejected the "leveraging" theory on the sound basis that even a monopolist can extract a monopoly profit only once. *See, e.g.*, *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546-49 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992); *see also* Bork, *The Antitrust Paradox* 365-

(continued...)

Not only are tying arrangements not inherently anti-competitive, the application of the *per se* rule does not result in any judicial economies. Under *Jefferson Parish*, a court must examine the character of demand for the tying and tied product to determine whether there are two products involved and then closely examine the structure of the tying product market including the defendant's market share, the existence of barriers to entry and the number of other competitors, in order to determine whether the requisite economic power over the tying product is present. Next, the court must analyze whether or not "forcing" has occurred. Moreover, as *Jefferson Parish* and *Kodak* make clear, a court must also perform a sophisticated analysis of market imperfections in the tying product market including information asymmetries, the inexperience or sophistication of purchasers, and switching costs.

Ironically, the only analysis a court is precluded from performing under the *per se* rule is whether the challenged conduct actually harms or enhances competition -- which is, after all, the purpose of the Sherman Act and the ultimate inquiry.

All this undoubtedly led Justice O'Connor to conclude in her concurrence in *Jefferson Parish* that:

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[17](...continued)
81; Posner, *Antitrust Law: An Economic Perspective* 171-83; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. at 143-45.

> [the] tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial.

466 U.S. at 34 (O'Connor, J., concurring).

This case involves a straightforward practice, obviously pro-competitive on its face. BAR/BRI was simply responding to PMBR's and others' competition and years of intense critical advertisements focused on BAR/BRI's refusal to include Gilbert's training in its full-service course. It is undisputed that the summer 1992 BAR/BRI course gave students more training for the same cost. Under the lower court's ruling, BAR/BRI could be required to de-integrate the full-service course demanded by students into a separate supplemental MBE workshop that has been resoundingly rejected by the market and a full-service course that is inferior by definition because it cannot include the best MBE training BAR/BRI is capable of providing. Application of the *per se* rule in this case would serve only to protect PMBR and others similarly situated from the kind of aggressive competition the Sherman Act is all about:

> The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

> It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, 113 S. Ct. at 891-92.

The Court should act to protect the workings of the marketplace by abandoning the *per se* rule or clarifying it to permit consideration of the product improvement business justification defense.

B. THE TENTH CIRCUIT'S RULING DEPARTS FROM PREVAILING LAW IN ASSIGNING TO JUDGES AND JURIES RATHER THAN THE MARKETPLACE DETERMINATIONS AS TO THE MERITS OF ATTEMPTED PRODUCT IMPROVEMENTS

The antitrust laws should encourage all competitors in a market, including monopolists, to respond to competition by attempting to improve their products. *Telex Corp. v. IBM*, 510 F.2d 894, 927 (10th Cir.) (Sherman Act cannot be invoked against a monopolist to "prohibit the adoption of legal and ordinary marketing methods already used by others in the market"), *cert. dismissed*, 423 U.S. 802 (1975). Particularly where there can be no claim that compatibility with a monopolist's system is essential to gaining market access, any rule that would allow juries to assess treble damages if they found that attempts to improve products were unsuccessful would deter the very conduct that the antitrust laws encourage. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375, 378 (7th Cir. 1986) ("monopolist should be free to compete like everyone

else"; "*the free market and not a judge or a jury decides whose products are inferior*") (emphasis added), *cert. denied*, 480 U.S. 934 (1987). *See also California Computer Prods. v. IBM*, 613 F.2d 727, 744 (9th Cir. 1979) (monopolist has "the right to redesign its products to make them more attractive to buyers"). Professors Areeda and Hovenkamp advocate a rule of presumptive lawfulness for product redesigns. They state:

> At the very least, as all courts recognize, product improvement is protected and beyond antitrust challenge. . . . That buyers prefer the redesigned product over the previous and still available product is often conclusive evidence of an improvement.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 738.1, at 677 (Supp. 1995).

The Tenth Circuit decision effectively nullifies product improvement as a viable defense for entities with market power, placing them at risk of treble damages based on the unpredictable reaction of a jury whose members may never have had a need for the product. In so doing, the court's ruling forestalls competition in the bar review industry and gives short shrift to the important policy concern voiced by circuit courts and commentators that judges and juries should not be asked to determine the validity of a product modification -- a question best left for determination by marketplace competition.

It is difficult to imagine a greater perversion of the antitrust laws than to invoke them, as PMBR seeks to do, to thwart any effort by BAR/BRI to address perceived product

deficiencies, particularly when these deficiencies were the subject of PMBR's attack advertisements against BAR/BRI and when PMBR in other markets and BAR/BRI's other full-service competitors in Colorado and elsewhere have freely adopted the very same innovation.

III.

THE TENTH CIRCUIT IGNORED THE COURT'S PRONOUNCEMENTS ON THE LAW OF PREDATORY PRICING IN FINDING THAT A PRICE FOR A MULTI-COMPONENT PRODUCT COULD BE PREDATORY EVEN THOUGH SOLD ABOVE THE SUM OF THE COSTS OF ITS INDIVIDUAL COMPONENTS

The lower court's decision that predatory pricing may have occurred when BAR/BRI incorporated the Gilbert program into its full-service course without an increase in tuition conflicts with the Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993), that "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs."[18] *Id.* at 2587.

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[18] *See also* Hovenkamp, *Economics and Federal Antitrust Law* ¶ 8.7, at 228-29 ("Dominant firms [can engage in predatory pricing] by maintaining the price but providing an additional product or service at no additional charge . . . [But in such cases] [c]ompetitors are injured by the package only if the net price is predatory . . . .").

It is undisputed that the $795 tuition charged by BAR/BRI in the summer of 1992 more than fully covered all the costs of its course, including the Gilbert segment, and yielded a profit. To reach the conclusion that BAR/BRI may have engaged in predatory pricing, the Tenth Circuit arbitrarily refused to assign any of BAR/BRI's 1992 revenue to the three days of its course devoted to the Gilbert program, apparently because BAR/BRI's advertisements touted "Gilbert for free." (App. 20a)

The Supreme Court has recognized the consensus among economists "that predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589. Thus, courts should be extremely cautious in evaluating claims of predatory pricing lest the court "chill the very conduct the antitrust laws are designed to protect." *Id.* at 594. This is especially true in this case where PMBR is arguing that a competitor has violated the antitrust laws by improving a product without a price increase. This reasoning could apply as well to any other product improvement not accompanied by a price increase, or any claim that a product includes "free" extras. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior ends up by discouraging legitimate

price competition.").[19] This dramatic extension of the doctrine of predatory pricing requires review by the Court.

IV.

THE LOWER COURT'S CONCLUSION THAT BAR/BRI HAD A DUTY TO COOPERATE WITH A COMPETITOR IS CONTRARY TO THE TEACHINGS OF THE COURT

Finally, the Tenth Circuit reinstated PMBR's Section 2 claim based upon alleged schedule conflicts between BAR/BRI and PMBR. In so doing, the Tenth Circuit's imposition of potential liability against BAR/BRI for refusal to cooperate with a rival violates the teachings of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

In *Aspen Skiing,* the Court made it clear that businesses ordinarily do not have a duty to cooperate with their rivals, but permitted liability in that case because the defendants had terminated an existing pattern of cooperation with intent to monopolize:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been

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[19] The Tenth Circuit's analysis in this case also creates a classic Catch 22: if BAR/BRI does not increase tuition for the improved full-service course it is guilty of predatory pricing, but if it does increase tuition it is guilty of an unlawful tie-in.

> proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.

472 U.S. at 603. In this case, in contrast, there is no history of cooperation between the parties to coordinate their schedules. BAR/BRI had no duty to schedule its own course in order to avoid scheduling conflicts with PMBR or predisclose its schedule so that PMBR would have more advance notice than BAR/BRI's own students. Its failure to do so cannot be treated as an unlawful attempt to monopolize.[20]

The Tenth Circuit attempts to justify potential liability for schedule conflicts by observing that conflicts might tend to disproportionately raise PMBR's costs or to inconvenience prospective students. (App. 31a n.12) It fails to explain when a refusal to cooperate would *not* have the effect of adversely affecting consumer demand for a rival's product or raising its costs. This failure is hardly surprising, since *any* refusal to cooperate by a monopolist could be characterized as a means of adversely affecting consumer demand for a rival's product or raising its costs. This is not only inconsistent with the narrow exception permitted by *Aspen Skiing*, but also removes any practical limitations upon the potential liability faced by monopolists for refusal to

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[20] Indeed, the injunction sought by PMBR in this case would require BAR/BRI to publish its course schedule, and then not change it other than for "unavoidable and unforseen reasons," far enough in advance for PMBR to set its own schedule. (Pretrial Order ¶ III.A. at 4)

cooperate with business rivals. If this conflict with *Aspen Skiing* is not addressed by the Court, the Tenth Circuit's ruling will open a Pandora's Box of new refusal to cooperate theories.[21]

The mischief inherent in the Tenth Circuit's position is perhaps best understood from the relief requested by PMBR, requiring BAR/BRI to pre-disclose its forthcoming course schedule to PMBR and lock itself into that schedule so that PMBR could decide how best to schedule its course to gain the maximum competitive advantage. Once published, BAR/BRI would need its competitor's permission to make changes in its schedule to deal with even the normal problems associated with coordinating faculty members' individual schedules. This is inconsistent with the rulings of the Court and the intent of the antitrust laws.

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[21] The court below also overlooked the fact that in 1992, and thereafter, BAR/BRI added two days of additional MBE training to its full-service course, (Davis Aff. ¶ ¶ 23, 29), which made it inevitable that the number of days on which both the BAR/BRI and PMBR courses would be held would increase.

CONCLUSION

For the reasons set forth a writ of certiorari should issue.

Respectfully submitted,

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